STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GOURMET HARVESTING AND PACKING, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. 77-RC-14-E(R) 4 ALRB No. 14

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated it authority in this matter to a three-member panel.

Following *a* petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW) on March 16, 1977, a representation election was conducted on March *22*$_f$ 1977 among the agricultural employees of Gourmet Harvesting and Packing Company. The tally of ballots showed that the result was 435 votes for the UFW, 12 votes for no union, and 5 unresolved challenged ballots.

The Employer filed timely objections to the election, two of which were set for hearing: (1) that the Board erred in conducting the election because the Employer was a labor contractor and not an employer under the Act; and (2) that the UFW engaged in pre-election misconduct consisting of three incidents of violation of the Board's access regulation.

Subsequent to a hearing limited to the examination of these issues, Investigative Hearing Examiner (IHE) Suzanne

Vaupel issued the attached Decision in this matter, recommending that the objections be dismissed and the UFW be certified. Thereafter, the Employer filed timely exceptions to her recommended dismissal of the objection that the Employer was a labor contractor, along with a supporting brief.

The Board has considered the objections, the record and the IHE's Decision in light of the Employer's exceptions and brief and hereby affirms the rulings, findings and conclusions of the IHE, and adopts her recommendations.[1/]

[1/] No party excepted to the IHE's recommendation that the objection regarding access violations be dismissed. The alleged violations consisted of organizers' entry into a parking area where workers went to be paid at the end of their work day. The parking area was adjacent to one of the Employer's fields. Some 10-12 crews reported to the parking area to be paid over a span of several hours. UFW organizers waited outside the parking area and entered it to talk to employees each time a new crew arrived to be paid. Thus, their entrances to the property spanned several hours.

The IHE did not reach the question of whether such staggered access to separate crews at the end of each crew's work day was permissible under the access regulation 18 Cal. Admin. Code Section 20900 (e) (3) (a) and (4) (a)because she found no evidence that the alleged excess access affected the employees' free choice of a collective bargaining agent. While we agree with the IHE's conclusion, we find also that there was no access violation under the circumstances of this case.

Regulation Section 20900(e)(4)(A) provides that "[a]ccess shall be limited to two organizers for each work crew on the property...." Section 20900(e)(3)(a) provides that "[o]rganizers may enter the property of an employer for a total period of one hour....after the completion of work to meet and talk with employees in areas in which employees congregate...." Clearly the right of access to each crew is meaningless if organizers can enter the property for only a single one hour period at the end of the work day in cases where the work days for each crew end at staggered times over a period of several hours. A single hour of end-of-day access would permit access to only one or two crews instead of the 10 or 12 to which access was sought. The conduct of union organizers in entering the parking area as each crew finished work and reported to be paid, was a reasonable and appropriate interpretation of the access regulation which compromised the union's interest in obtaining access to the crews as they completed work with the Employer's interest in limiting the time which organizers spent on the property and avoiding work disruption.

The Employer contends that "[t]he sole question presented is whether Gourmet Harvesting and Packing Company is a labor contractor as defined by California Labor Code Section 1682. If the company fits within the definition of a farm labor contractor, it is excluded from the definition of an employer under 1140.4(c)...." We have previously rejected precisely that argument in Kotchevar Brothers/ 2 ALSB No. 45 and Napa Valley Vineyards, 3 ALRB No. 22. Where an entity which holds a labor contractor's license performs functions beyond the supplying of labor for a fee to such an extent that it assumes the primary employer relationship to the employees, we have found the entity to be an employer within the meaning of Labor Code Section 1140.4(c).

The employer argues that Labor Code Section 1682- [2/] is a licensing statute and must be construed liberally to protect farm laborers from labor contractor abuses. The same principle, however, applies to construction of the coverage of the ALRA which has as its purpose the encouragement

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[2/] Section 1682(b) provides:

> "Farm labor contractor" designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits,' solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for such workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to such persons.

and protection of the rights of farm workers to organize and bargain collectively with their employers. Moreover, Section 1140.4 (c) itself requires that the definition of agricultural employer be "liberally construed."

The interpretation urged by the Employer, that anyone who falls within the broadest reading of Section 1682 cannot also be an employer within the meaning of Section 1140.4(c) of the ALRA, creates & conflict in accomplishing the goals of the two statutes where there need be none, and sacrifices the interpretation of one to the other. On the other hand, our finding, that an entity which meets the definition of a labor contractor in Section 1682 is nevertheless an employer if it performs certain functions beyond those of a labor contractor, does not interfere with protections afforded to farmworkers under Section 1682 et seq.

The Employer's interpretation of the two statutes would render meaningless many of the categories which the legislature explicity included within the definition of an agricultural employer in Section 1140.4(c). That section provides:

> The term "agricultural employer" shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes...

Our experience has shown that entities such as cooperative growers, harvesting associations, hiring associations, and land management groups frequently are licensed labor contractors, A broad exclusion of any entity holding a labor contractor's license would nullify the specific statutory inclusion of these categories of employers.

Finally, our interpretation of the labor contractor exclusion is consistent with the legislative goal of encouraging stability in farm labor relations in California. The statutory exclusion of farm labor contractors, and the provision that the employer engaging the farm labor contractor shall be deemed the employer of the contractor's employees serves the goal of stability by fastening the bargaining obligation upon the entity with the more permanent interest in the ongoing agricultural operation. The factors which we consider in determining that an entity which is licensed as a labor contractor is nonetheless a statutory employer are indicia of that permanent interest and provide a basis for a more stable bargaining relationship. We conclude that it serves the statutory purpose to consider such an entity to be the primary employer.

In this case, the IHE properly found that although the Employer, in its role as a labor contractor, supplied labor to some growers, its business, taken as a whole, was that of a custom harvester-packer-marketer. It not only assumed full responsibility for harvesting crops such as asparagus, onions and melons, but also sub-contracted for the transportation of the crops to its leased packing shed, supplied all packing

materials and packed the crops, and arranged for marketing and shipping of the crops. Its fee consisted of the cost of all materials and labor supplied plus a percentage of that total as its profit. It therefore transcended the limited labor contractor role and became an agricultural employer under within the meaning of Section 1140.4(c) of the Act.

In view of the above findings and conclusions, and in accordance with the recommendation of the IHE, the Employer's objections are hereby dismissed, the election is upheld and certification is granted.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of Gourmet Harvesting and Packing Company, for the purposes of collective bargaining, as defined in Labor Code Section 1155.2(a), concerning employees' wages, working hours and other terms and conditions of employment.

DATED: March 29, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

CASE SUMMARY

Gourmet Harvesting and Packing (UFW) Case No. 77-RC-14-C
4 ALRB No. 14

IHE Decision

After an election won by the UFW, a hearing was held on two Employer objections: (1) that the Board erred in conducting the election because the Employer was a labor contractor and not an employer under the Act; and (2) that the UFW engaged in pre-election misconduct consisting of three incidents of violation of the Board's access regulation.

The IHE found that although the employer held a labor contractor's license and performed some functions characteristic of a labor contractor, its business, taken as a whole, was a harvest-through-market operation and in this capacity the employer functioned as more than a labor contractor. It was therefore an employer under the Act. The employer filed exceptions to this finding.

The IHE also found the alleged access violations involved UFW organizers entering a parking area where employees reported to be paid at the end of their work day. Since the work ending times for the several crews were staggered over a several hour period, the organizers entered the parking area several times over that period as each new crew arrived. The IHE recommended that the objection be overruled on the ground that the access taken did not interfere with employees' free choice of a collective bargaining representative. No party filed exceptions to this recommendation.

Board Decision

The Board affirmed the IHE's finding that the Employer is an employer within the meaning of Section 1140.4(c) of the Act since the Employer was a custom harvester-packer-marketer. The Board's discussion reconciles coverage of such employers under the ALRA with coverage by Labor Code Section 1682 et seq., the labor contractor licensing statute.

The Board also stated, in dicta, that it did not find the incidents of staggered access to separate crews at the end of each crew's work day to be violations of the Board's access rule.

STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

GOURMET HARVESTING & PACKING CO.,

Employer, Case No. 77-RC-14-E

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Scott A. Wilson, Imperial Valley Vegetable Growers Association, for Employer.

Tom Dalzell, for United Farm Workers of America, AFL-CIO.

DECISION

SUZANNE VAUPEL, Investigative Hearing Examiner: This case was heard by me on November 14 and 15, 1977 in El Center, California. A representation election was held at Gourmet Harvesting and Packing Company on March 22, 1977. The tally of Ballots showed the following results:

United Farm Workers	435
No Union	12
Unresolved Challenged allots	5
Total Valid Votes	452

Gourmet Harvesting and Packing Company (hereafter "the company" or GH&P) filed timely objections to the election. On July 14, 1977, the Executive Secretary set the following objections for

hearing and dismissed the remaining objections:

1. The United Farm Workers Union, through its agents, took access to employer's fields at times other than those provided for by the access regulations on the following occasions, which resulted in coercion and restraint of the workers right to freely decide whether or not to organize into a union:

a) On February 26, 1977, UFW organizer Yolanda Pacheco at 6:30am, entered the company's field and campaigned,

b) On March 19, 1977, at 11:30 a.m. while work was in progress, UFW organizers Linda Manning and Yolanda Pacheco refused to remove themselves and their cars from the company's fields.

c) On March 21, 1977, from 6:00 a.m. to 8:30am, UFW organizers Linda Manning and Arturo Mendoza stayed in the fields while work was in progress and campaigned for the UFW.

2. The Agricultural Labor Relations Board acted improperly by conducting an election among the workers of *a* labor contractor who is not an agricultural employer as defined fay the Agricultural Labor Relations Act,

All parties were represented at the hearing and were given full opportunity to participate in the proceedings. Post-hearing briefs were submitted by each party. Upon the entire record, including my observation of the demeanor of the witnesses

and consideration of the briefs submitted by the parties, I make the following findings of fact and conclusions of law:

I. JURISDICTION

The company challenges the Board's jurisdiction over it, contending that it is a labor contractor and thus not an agricultural employer within the meaning of the Agricultural Labor Relations Act, Jurisdiction over the company, therefore, will be established only if I find that the company is an employer within the meaning of the Act, Since this point is at issue, I will not make a finding here.

Neither party challenged the Board's jurisdiction over the United Farm Workers of America, AFL-CIO, (UFW). Accordingly, I find that the UFW is a labor organization within the meaning of Labor Code §1140,4(f).

II. ALLEGED EXCESS ACCESS

Findings of Fact

Evidence was presented on the three incidents of alleged excess access which were set for hearing. The company witness also alluded to other incidents in February and March, 1977. Since no other incidents were specified in the objections petition or were set for hearing, I cannot consider them here.[1/]

[1/] 8 Cal. Admin. Code §20365(g) (1976)

Harold Rochester, harvesting supervisor and vice-president of Gourmet Harvesting, testified that he observed UFW organizers during the pre-election campaign while he was dispatching crews. On February 26 he observed Yolanda Pacheco, whom he identified in the hearing room and whom he knew to be employed by the UFW, campaigning in the fields of Gourmet Farms one-half hour after work started. She remained for two hours, talking to workers who stopped and listened.

On March 19, Rochester observed UFW organizers Linda Manning and Yolanda Pacheco in the same field at about 8:00 a.m. Both organizers remained about five hours passing out leaflets and campaigning among workers. He asked them to leave and they responded that they had the right of access and the right to talk to workers. Rochester replied that they were violating the access rule and he made a citizen's arrest in the presence of a deputy sheriff.[2/] The arrest incident took place at about 1:00 p.m. and lasted about twenty minutes. Rochester testified that two to three crews were being paid in the fields at that time, and one crew was working, cutting asparagus. The closest employees who were working were about 25 yards from the area where the arrest took place. Others were about 200 yards away. Some of those who were working observed the incident and others continued working.

[2/] Mr. Rochester was unclear as to whom he had arrested. He later testified that he arrested Linda Manning and Art Mendoza.

On March 21, 1977, Rochester observed Arturo Mendoza with Ms. Pacheco and Ms. Manning in the same fields. He testified that he saw them when he arrived at 8:00 or 8:30 a.m. and that they remained three hours in the morning and two hours in the afternoon.[3/] According to Rochester, about 35 employees were working in the field in the morning and they continued working except when the organizers talked to them, work was finished by about 1:00 p.m.

Rochester stated that all three incidents occurred at the same location, a stack yard in the corner of an 80-acre asparagus field. There were stacks of bailed asparagus ferns and several trees in this area. Fifty to sixty percent of GH&P's crews were paid in the stack yard daily after they finished work. The crews would finish work at various times, with the first asparagus crews coming in at about 9:30 or 10:00 a.m. and the last crews arriving between 3:00 and 4:00 p.m. GH&P had about 20 crews working in asparagus, so approximately 10 to 12 crews came to the stack yard to be paid. It took about 20 minutes for each crew to be paid.

[3/] On cross-examination, Rochester was questioned about an earlier declaration that was submitted to the Board (UFW Exhibit 1), which he had used to refresh his memory. This declaration stated that on March 21, the organizers were in the fields from 6:00 to 8:30 a.m., rather than five hours beginning at 8:00 a.m. While this discrepancy could put the witness' testimony into question, no credibility resolution need be made here.

The testimony of UPW organizers, Maria Luisa Pacheco (whom Mr. Rochester had pointed out as Yolanda Pacheco) and Art Mendoza did not differ greatly from that of Mr. Rochester, but it did create a different picture. Mr. Mendoza drew a diagram of the stack yard [4/] which showed that the yard was bounded by roads on two sides and separated from the asparagus fields by asparagus fern stacks which were about 12 feet high. There were several trees and a trash trailer in the area. The workers knew this area as los arboles, "the trees." They would arrive in buses or their own cars to be paid and would park in this area.

Both organizers testified that they would arrive between 9:00 and 10:00 in the morning and would go into the area only when the buses and workers were there. When no crews were in los arboles, the organizers waited outside the area. They both stated that they were never in the fields when employees were working. Ms. Pacheco stated that neither Rochester nor Alfred Medrano, who paid the workers, had asked them to leave before the day of the arrest. [5/] The arrest took place in the stack yard.

[4/] UFW Exhibit 3.

[5/] Mr. Mendoza testified that the arrest took place on the day before the election which would be March 21, 1977, and that this was reflected in the police report. Mr. Rochester testified that the arrest occurred on March 19, 1977.

Analysis and Conclusions

Section 20900(e)(3)(A) of the Board's regulations [6/] states that organizers may enter the property of an employer for a total period of one hour after the completion of work to meet and talk with employees in areas in which employees congregate. Section 20900(e)(4)(A) provides that access shall be limited to two organizers for each work crew up to 30 and there may be one additional organizer for every 15 additional workers. Violations of these rules may constitute grounds for setting aside an election where such conduct affected the results of the election.[7/] The Board has declined to set aside elections where excess access taken by a labor union could not have affected the results of the election.[8/]

In order to set aside an election on the basis of an excess access objection, two findings must be made: first, that such violations occurred; and second, that the violations could have affected the outcome of the election.

The UFW argues that a staggered finishing time should result in a right to access at staggered times. Since the crews were coining into the stack yard to be paid any time from 9:30

[6/] 8 Cal. Admin. Code §20900 (e) (3) (A) (1976).

[7/] 8 Cal. Admin. Code §20900 (e) (5) (B) (1976).

[8/] Dessert Seed Company, Inc., 2 ALRB No. 53 (1976); K.K. Ito Farms 2 ALRB No. 51 (1976) ; John V. Borchard Farms, 2 ALRB No. 16 (1976).

until 4:00, one hour of access would only give the organizers an opportunity to talk to a few of the approximately 20 crews.

The issue of post work access when crews finish work at different times has not been addressed by the Board. While the access rule provides for only one hour of access on the employer's property after work, it also provides that at least two organizers may be on the employer's property for each work crew. In this case, therefore, approximately 40 organizers could take access to talk to the 20 crews. There was no single hour, however, in which organizers could exercise this right.

While this situation calls for an interpretation of the access rule which would balance fairly the rights of the parties, such an interpretation is not necessary here. Considering only the evidence submitted by the company, the record does not reflect conduct that could have affected the outcome of the election. Mr. Rochester recounted three incidents of alleged excess access. All of these, he indicated, were in an area where workers get paid. The only disruptions alleged were that workers stopped to listen when the organizers spoke to them and that some members of one crew stopped working and observed Mr. Rochester making a citizen's arrest of two organizers. Mr. Rochester's testimony that organizers interrupted work of the employees was inconsistent with his statement that all 3 incidents took place in the stack yard, an area where workers came to get paid after completing work.

No evidence was submitted to show that the alleged excess access could have affected the employees' free choice of a collective bargaining agent.[9/] Nothing in the record indicates that the alleged misconduct could have had an intimidating impact on employees or that it resulted in coercion or restraint. Nor was an opposing union disadvantaged by the alleged conduct. To the contrary, it appears that the organizers took access on the employer's property in a non-disruptive manner by concentrating their activities in an area away from work areas. Such access would seem to minimize the possible disruptions. Further evidence that the conduct of the organizers was not disruptive was demonstrated by the fact that they were not asked to leave until, at most, three days before the election, even though they had been seen organizing at Gourmet Farms for at least a month earlier.

Since the record reflects no conduct which could have affected the free choice of a collective bargaining representative, I dismiss this objection.

III. THE EMPLOYER ISSUE

Findings of Fact

1. The Company

Gourmet Harvesting and Packing contends that it is a labor contractor and therefore not an agricultural employer within the meaning of the Agricultural Labor Relations Act.[10/]

[9/] See K.K. Ito Farms, 2 ALRB No. 51 (1976).

[10/] Labor Code §1140.4(c).

The company argues that its year-round operations primarily involve providing field labor to various farmer clients.

The petitioner contends that GH&P is more than just a labor contractor, since it provides full services including weeding, thinning, harvesting, packing and sales. The "whole activity" of the company, petitioner argues, brings GH&P within the definition of an agricultural employer under the Act.

The facts concerning the company are largely undisputed. Gourmet Harvesting and Packing is a California corporation, incorporated in October, 1974. The Articles of Incorporation list the company's primary purpose as harvesting and packing and its general purpose as the business of selling, shipping and transporting agricultural products. The original directors of the company were James Enis, Richard Enis, and David R. Dotson. The original officers of the corporation were Richard Enis, President; James Enis, Vice-President; Harold Rochester, Treasurer; David Dotson, Secretary. In February, 1976 the new officers were Richard Enis, President; Harold Rochester, Vice-President; James Enis, Secretary-Treasurer. Company headquarters are at 1399 Forrester Road, El Centre, California. The company is licensed as a farm labor contractor by the State of California and the U.S. Department of Labor.[11/]

[11/] Employer Exhibits 1, 1A, and IB.

2. Services Offered

The company has the capacity and facilities to offer a variety of services. It mobilizes workers and crews as needed. It also leases four packing sheds. Two of these are used for packing asparagus and two are equipped to pack onions and cantaloupe. During the year preceding the filing of the petition, the company had thirty-two clients. 'The clients were diverse, ranging from a labor contractor to farming companies such as Gourmet Farms, Claussen Pickle, La Brucherie, and California Spice. The types of services varied from "spot jobs,"[12/] to "full services" which included weeding, thinning, harvesting, packing and marketing.[13/]

Although Mr. Enis testified that any client might contract for any one or combination of services, his testimony indicated a pattern in the services rendered which depended on the crop involved. Generally, the services provided for each crop were as follows:[14/]

a) Asparagus: harvest, pack, market.

b) Onions, cantaloupe: weed, thin, harvest, pack, market.

[12/] These included warehousing, providing buses and trailers, and furnishing labor for miscellaneous jobs.

[13/] GH&P has no written contracts for its work. It does keep running cost accounts (discussed at page 15, infra) and billing invoices.

[14/] Testimony was ambiguous as to whether GH&P also weeds and thins asparagus. On direct examination, Mr. Enis stated the company did weeding, thinning, harvesting, packing and marketing for Gourmet Farms in onions, cantaloupe, and asparagus. On cross-examination he stated GH&P did no pre-harvest work in asparagus that he was aware of.

c) Garlic: weed, thin, harvest, transport to market or storage.

d) Pickles: weed, thin, harvest, bulk pack, forward for processing.

e) Gourds: weed, thin, harvest.

f) Tomatoes: weed, thin, sometimes provide labor for mechanized harvesters.

g) Lettuce, broccoli, sugar beets, cotton: weed, thin.

GH&P operates eight or nine months out of the year. The asparagus harvest-through-market operation occurs between January and March. The cantaloupe "through shed" operation occurs in the spring and again in the fall. The harvesting and packing of onions occurs in mid-April. Weeding services are provided most of the year.

Mr. Enis indicated that GH&P's peak work was during the asparagus harvest, when they mobilize all their field crews.[15/] The asparagus season lasts six weeks to two months. GH&P actively solicits harvest and packing business from asparagus growers at the beginning of the season. Two years ago GH&P had the business of three growers. During the year preceding the election, Gourmet Farms was GH&P's only client in asparagus.

[15/] At the hearing, hiring and firing of workers was not discussed. Mr. Enis testified that GH&P "mobilizes" its crews. From this description, an inference could be made that GH&P exercises discretion in hiring and firing. Such a finding is not pivotal, however, since most labor contractors operate in this manner, as do agricultural employers.

3. The Asparagus Operation

The services which GH&P provides in asparagus were explained in the testimony and exhibits concerning their one asparagus client in 1977, Gourmet Farms. Full services were provided from harvesting through sales.

a) Field Work

Field workers arrive at the job in GH&P buses or in their own cars. The company owns thirteen buses for transporting workers and two flatbed trucks which are used for transporting 'portable toilets and for other miscellaneous purposes.

The company supplies the hand implements used by the workers.[16/] In asparagus, this means cutting knives and wheelbarrows (known as "burros") which are used to carry boxes to the end of the fields. GH&P supplies the field boxes and charges the client for them at the end of the season.

With the field workers, the company provides supervision. A foreman and sometimes an assistant foreman are provided with each crew. Additionally, the company employs a harvesting supervisor. The grower may also have foremen in the field. Gourmet Farms employs a "grower" who has two foremen under him.

Generally, no field decisions are necessary after a grower calls in GH&P to harvest the asparagus. The decision

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16/ Most of GH&P's field work is in labor intensive crops, where larger equipment is not used.

as to when the asparagus will be harvested is actually made much earlier, when the grower decides to cut the asparagus fern. Once the harvest has begun, each field is cut every day. If a change in the cutting procedure is necessary, however, such a decision would be made by the GH&P crew foreman. This decision would then be reviewed at two levels by Gourmet Harvesting and finally by the grower.

Field workers are paid by Alfred Medrano, also known as "Chassis." Taxes are deducted from the workers' pay.[17/] The company employs a payroll manager, two to three bookkeepers, two to four secretaries (depending on the time of year), and an office manager to keep necessary records.

b) Shed Work

The company arranges for the asparagus to be transported from field to shed by independent contractors. This cost is passed on to the client.[18/]

GH&P leases two sheds for packing asparagus.[19/] Its shed workers are covered by collective bargaining agreements under the jurisdiction of the National Labor Relations Board.[20/]

[17/] The pay scale can vary depending on the grower.

[18/] The company makes similar arrangements when working in onions and cantaloupe. It does not own the trucks necessary for this hauling.

[19/] One of these is owned by Gourmet Farms and located at 1399 Forrester Road, the same address as the main office of both Gourmet Farms and GH&P.

[20/] The two relevant contracts covering all GH&P shed workers in the four sheds, were submitted into evidence as UFW Exhibits 11 and 12.

During the payroll period preceding the filing of the petition, GH&P employed 291 people in the sheds. This number includes bunchers, packers, sorters, utility workers,[21/] checkers, stampers, button girls, press operators, forklift operators, supervisors, a receiver, a maintenance worker and loaders. GH&P purchases the pack-out boxes used in the sheds and passes the cost on to the client.

c) Marketing

GH&P also provides marketing and sales services. It is listed as a shipper of asparagus, onions, and lettuce in the Blue Book, the "industry bible" according to Mr. Enis. Produce is marketed either under the GH&P label, or the grower's own label. The company coordinates the pick-up of the produce from its loading dock. One salesman is employed by the company.

4. Fees

Clients are billed on a "cost plus" basis. All costs of harvesting, packing, and sales are totaled and a percentage of that amount is added as profit. For "through shed" services, GH&P keeps a running account of all expenses and at the end of the season presents a summary sheet to the

[21/] UFW Exhibits 8 and 10 list "utility" as a category of shed Tabor. It is presumed this means utility workers.

to the farmer. [22/] A "settlement" is reached by subtracting the total fee (cost plus percentage) from the client's share of the revenue.[23/] On occasion, when the costs are especially high, GH&P requests an advance against the settlement. This amount is accounted for in the ultimate settlement.

Work other than the harvest-through-sales work is billed in the same manner - totaling costs, then adding a percentage as profit. The customer is billed on a weekly basis for this work.

[22/] UFW Exhibit 8 is a running account of costs involved in the asparagus harvest-through-market operation for Gourmet Farms during the week preceding the filing of the petition. The first page shows field costs. These costs include foremen, taxes, contract hauling, bus expense, gas, oil, flats, and miscellaneous in addition to crew labor. The second page shows shed material costs for the following items:

Cartons
Crates
Imperial County Inspection
California Shipping Points Ins.
Leased Equipment
Chemical Application
Western Growers Dues
Shed Equipment Rent
Misc. Staples, Shock, Pads, Spacers
Misc.

The third page shows shed labor costs which include supervisors, utility workers, payroll taxes, fringe benefits and box repair in addition to regular workers.

[23/] GH&P determines the grower's share of the revenue by the percentage of the total produce sold which comes from his fields. For example, if a grower owned one-third of the produce packed in one day, he would be entitled to one-third of the revenue from that day minus cost and percentage. If a grower wished his produce to be marketed under his own label, GH&P would charge him for the additional costs involved in stopping the packing lines and changing boxes.

5. The Clients

During the week preceding the filing of the election petition, Gourmet Harvesting provided services for two clients: Hubbard/La Brucherie and Gourmet Farms. The services included field work for both clients and full harvest-through-market services for Gourmet Farms. The field work totaled 97 worker days over a three day period for Hubbard/La Brucherie and 127 worker days over a seven day period for Gourmet Farms. The harvest-through-market services for Gourmet Farms included 3,656 workers cutting asparagus [24/] and 291 shed workers.[25] During the week preceding the filing of the certification petition, 97 percent of the GH&P field workers performed services for Gourmet Farms.

Gourmet Farms is a California corporation, incorporated in May, 1976, for the primary purpose of purchasing, leasing, and farming real property. As of April 14, 1977, this company was not conducting business. The present directors are Robert F. Beauchamp and James B. Beauchamp of Irvine, California and James Enis of El Centro. These three also serve as chief executive officer, secretary, and chief financial officer

[24/] UFW Exhibit 9. Although Mr. Hutchins testified that these figures represented the numbers of workers employed, there may be a misunderstanding. If these figures are treated as "worker days," it produces an average of 522 workers per day in the asparagus harvest. This number is closer to the 500 figure given in the certification petition for estimated number in unit. The company did not supply information on the size of the unit in its response to the petition.

[25/] UFW Exhibit 10.

respectively. The principal executive office is at 1399 Forrester Road, El Centro, where James Enis is agent for service of process.[26/]

Gourmet Farms owns an asparagus packing shed located at 1399 Forrester Road in El Centro. Gourmet Harvesting leases this shed from Gourmet Farms. GH&P has harvested, packed, and marketed asparagus for Gourmet Farms for three years. It also provides pre-harvest-through-market services to Gourmet Farms in onions and cantaloupe and miscellaneous field labor in these crops and others.

Analysis and Conclusions

The question of whether Gourmet Harvesting and Packing Company is an employer or labor contractor goes to the basis of the Board's jurisdiction in the case. The definition of "agricultural employer" provided by the Act is a broad one:

> The term "agricultural employer" shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any

[26/]This information on Gourmet Farms was compiled from the testimony of Richard Enis and a certified corporate statement which the hearing examiner requested of the Secretary of State and of which official notice is taken. The testimony elicited at the hearing did not fully explore the relationship between GH&P and Gourmet Farms. Richard Enis testified that Gourmet Farms is a separate entity of which he owned no part. He denied knowing if his brother, James Enis, is on the Board of Directors of Gourmet Farms. I find that Mr. Enis[1] testimony lacks credibility on this point, since he and his brother serve as president and secretary-treasurer of GH&P respectively; since his brother is a director, an officer and the agent for service of process of Gourmet Farms; and since the principal office of both companies is at the same address.

> individual Grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages [27] land used for agricultural purposes...

The company argues, however, that Gourmet Harvesting and Packing falls under the exception:

> ...but [the term "agricultural employer"] shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by §1682, and any person functioning in the capacity of a labor contractor. [28]

A labor contractor is defined by §1682:

> (b) 'Farm labor contractor' designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging or transportation for such workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to such persons. [29]

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[27] Labor Code §1140.4(c).

[28] Id.

[29] Labor Code §1682.

The Board has been presented with a variety of cases in which the respondent has claimed that it did not meet the statutory definition of employer. The issue in three cases was whether or not a particular person or entity fell within the labor contractor exemption. In the first of these, Kotchevar Brothers, ALRB No. 45, the Board likened the role of a labor contractor to that of a middleman - one who contracts with growers to provide labor when needed. Since his fee is normally a percentage override of the actual cost of labor, a labor contractor is one who collects his fees and makes his profits from the laborers actually doing the work.

In Kotchevar, the Board found that Ranse Walker, while a labor contractor, was something more as well. In addition to the wine grape pickers, Mr. Walker provided the equipment used in the harvesting operations and assumed responsibility for getting the grapes to the winery. His fee constituted payment for this entire service, rather than simply for the labor. The Board found that Walker was a custom harvester and an agricultural employer within the meaning of the Act.

In Napa Valley Vineyards Co., 3 ALRB No. 22, the Board again found that an agricultural entity could be a farm labor contractor plus something more. Citing Kotchevar, the Board found that a farm labor contractor was included within the Act's jurisdiction where its duties and compensation were beyond those of a normal farm labor contractor. In a footnote, the

Board noted the impracticality of finding that a farm labor contractor must be excluded from jurisdiction on that basis alone, since it would be only a matter of simple bookkeeping for all agricultural employers to supply labor for a fee in some measure and be licensed as farm labor contractors.

The Board found that Napa Valley Vineyards performed substantial farming operations, which qualified it as a land management group, in addition to the "spot jobs" which conformed to normal services provided by a farm labor contractor. Looking to the "whole activity" of the company, the Board noted that the company generally performed all vineyard operations from planting through harvesting; determined day-to-day operations and thus had the most immediate control over the workers, and their working conditions; exercised its own initiative, judgment and foresight in managing the various owners' land; and had the authority to hire and fire workers as well as make and supervise daily work assignments.

In a third case, Cardinal Distributing Co., 3 ALRB No. 23, the Board found that Jose Ortiz was a labor contractor and not a custom harvester. Mr. Ortiz provided workers for manual harvesting in green onions, beets, parsley, cabbage, and carrots. Unlike the services provided by Mr. Walker in Kotchevar, Mr. Ortiz only provided workers for manual harvesting and did not supply additional services. Thus, the full extent of his services was providing labor for a fee.

The dissent in Cardinal would find Mr. Ortiz a custom harvester. The basis of this conclusion was that, according to the employer's brief, Mr. Ortiz was paid on a pack-out basis at a rate established in advance of the harvest season, and that Mr. Ortiz supervised the employees. On the basis of the "pack-out" form of payment, the dissent presumed that Mr. Ortiz provided trucks and trailers. (Emphasis added.) Neither the majority nor the dissent identified any specific service provided by Mr. Ortiz other than providing workers for manual harvesting.[30/]

In a recent case, Jack Stowells, Jr., 3 ALRB No. 93, the respondent claimed to be a supervisorial employee. The charging party claimed that the respondent was engaged in ranch management services and an employer within the meaning of the Act. The record indicated that the respondent supplied nine different ranches with labor and some equipment. The services included general labor, irrigation, tractor driving, and pruning of citrus. The Board found that the respondent exercised managerial judgment, provided some equipment and received *a* per-acre management fee and on this basis and the entire record, he was an agricultural employer.

[30/] The record in Cardinal is significantly limited, since the case went to the Board on exceptions to the regional director's challenged ballot recommendations. The full record consists of the regional director's recommendations and the employer's exceptions. No hearing was conducted in that case. The record did not indicate that Mr. Ortiz owned any equipment.

In each of the above cases, the Board analyzed a number of factors to determine whether an entity was an agricultural employer within the meaning of the Act. These factors necessarily varied according to the type of services offered. In each case, however, the basic question decided by the Board was whether the primary business was something more than supplying labor for a fee. In Kotchevar, Mr. Walker not only supplied the wine grape pickers, but also supplied equipment and assumed responsibility for getting the grapes to the winery. [31/] In Napa Valley Vineyards , the company performed substantial farming services, determined day-to-day operations, exercised initiative, and judgment in managing the land of other owners, had immediate control over the workers, had the authority to hire, and fire, and collected a fixed per-acre management fee. In Jack Stowells, the respondent exercised managerial judgment, provided some equipment and received a per-acre management fee. Mr. Ortiz, in Cardinal Distributing , provided nothing more than workers for manual harvesting and therefore was not an agricultural employer within the meaning of the Act.

In the case before me, the company argues that its field to shed hauling and the packing and marketing operations cannot be considered in making a determination as to its labor

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[31/] The equipment supplied by Walker consisted of the gondolas used to transport grapes to the winery. See Cardinal Distributing Co., 3 ALRB No. 23, (dissenting opinion).

contractor status, since these activities are outside the coverage of the ALRA. To do so, the company contends, would be to use evidence of the company's business operations over which there is no ALRA jurisdiction in order to establish ALRA jurisdiction.

This argument confuses several issues by using the concept of jurisdiction to limit admissible evidence. "Jurisdiction" is not a tool of analysis which determines the evidence to be considered. It is a conclusion which can be reached only after considering all relevant evidence. Both the NLRB and ALRB commonly look at every aspect of a respondent's business to determine which employees, if any, they can properly assert jurisdiction over.[32/] Accordingly, I have considered all aspects of Gourmet Harvesting and Packing's business for the purpose of establishing the nature and scope of the services offered.

The company also argues that the time period beyond the week in which the certification petition was filed should be considered in making a determination of labor contractor status. At the hearing, the UFW objected to the introduction of evidence of the company's activities outside the week preceding the filing of the petition. I overruled the objection, holding

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[32/] E.g., Employer Members of Grower-Shipper Vegetable Association of Central California, 230 NLRB 150 (1977); Columbiana Seed Co., 119 NLRB 560(1957) ; Associated Produce Distributors, 2 ALRB No. 47 (1976) and NLRB Case No. 20-RM-1907 (1975); Mann Packing Co., Inc., 2 ALRB No. 15 (1976); Carl Joseph Maggio, Inc., 2 ALRB No. 9 (1976).

that all evidence concerning Gourmet Harvesting and Packing's work is relevant to the labor contractor issue. Consistent with this ruling , I have considered evidence of GH&P's year-round operation to determine whether the company is an agricultural employer.

Looking at the whole activity of Gourmet Harvesting and Packing, I find that its primary business is the harvest-through-market operation. The company has emphasized that the number of clients requesting miscellaneous labor is greater than the number requesting full services and the number of months in which it provides miscellaneous labor is greater than the number of months during which it operates the harvest-through-market services. Nevertheless , the volume of business in the harvest-through-market operation, as indicated by the number of workers hired , the costs involved, and the revenue generated , is far greater than the volume of business in providing miscellaneous services. For example, the costs for one week of the harvest-through-market operation totaled nearly $200,000, while the fee (cost plus profit) for "spot jobs" was under $7,000 in the same week and under $6,000 during a week considered "more representative" by the employer.

The following chart compares the volume of business in the asparagus harvest-through-market operation to the volume of business in "spot jobs", or miscellaneous labor:

	Total Worker Days	Average Field Workers Per day	Cost to GH&P (one week)	Fees to Client Cost + 30% one week
Harvest-through-market (week ending a/ 3/13/77)	3947 [3656 field workers, 291 shed workers]	522[b/]	$181,690.70 [$103,187.94-field costs, $33,253.82-shed material costs, $45,248,94-shed labor cost]	
Miscellaneous labor (week ending c/ 3/13/77)	229	33		$6665.02
Miscellaneous labor (week ending July 27, 1977) d/	261	37		$5675.58

a/ UFW Exhibits 8, 9, and 10.

b/ See Footnote 24, supra.

c/ UPW Exhibits 6 and 7.

d/ Employer Exhibit 2. The company submitted these Figures for a week it considered representative of its work.

In its primary business, I find that Gourmet Harvesting and Packing functions as substantially more than a labor contractor. In addition to providing labor for a fee, the company assumes responsibility for hauling the crop from field to shed, packs the crop, markets the crop, coordinates pick-up for market, and provides all necessary equipment and supplies to carry out these services. The company exercises immediate control over its workers. It exercises discretion over hiring and firing. It provides two and sometimes three levels of supervision. It keeps payroll records, deducts taxes, and pays workers. GH&P also provides the hand tools and field boxes which the workers use in the fields.

The company exercises complete managerial responsibility over its post-harvest operations. It contracts for field to shed hauling; it purchases the necessary cartons and supplies; it provides packing and cooling services; and it maintains its own sales and marketing operation. Once a client has contracted for packing and marketing, his or her only input is to decide which label his or her produce will be marketed under.

The company's fee reflects the total harvest-through-market operation. All costs, including labor, supplies and other services,[33/] are totaled at the end of the season and a percentage of the total is added as profit.

[33/] See footnote 22, supra.

The record indicates that the company also provides miscellaneous labor or "spot jobs" to various clients. The Board has noted [34/] that a finding as to whether or not a company provides limited services does not preclude a finding that it functions primarily in some other capacity. It would only be a matter of simple bookkeeping, the Board wrote, for all agricultural employers to supply labor for a fee in such a fashion as to qualify for and be licensed as farm labor contractors. Accordingly, I find that the miscellaneous field labor service offered by GH&P is incidental to its primary operation of harvest-through-market services.

Having found that GH&P's primary business is the harvest-through-market operation and that in this capacity the company functions as substantially more than a labor contractor, I find that Gourmet Harvesting and Packing is an agricultural employer within the meaning of the Act. Accordingly, I find that the Board has jurisdiction over the company's agricultural employees. I dismiss the company's objection that it is not an agricultural employer.

[34/] Napa Valley Vineyards, 3 ALRB No. 22 (1976) (footnote 5)

RECOMMENDATION

Based on the findings of fact, analysis, and conclusions, I recommend that the respondent's objections be dismissed and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive bargaining representative of all agricultural employees of Gourmet Harvesting and Packing Company in the State of California.

DATED: February 8, 1978

Respectfully submitted,

Suzanne Vaupel

SUZANNE VAUPEL
Investigative Hearing Examiner